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In the Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

BRIEF OF PROFESSORS OF HISTORY GEORGE CHAUNCEY, NANCY F. COTT, JOHN D'EMILIO, ESTELLE B. FREEDMAN, THOMAS C. HOLT, JOHN HOWARD, LYNN HUNT, MARK D. JORDAN, ELIZABETH LAPOVSKY KENNEDY, AND LINDA P. KERBER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are professors and scholars who teach and write about history and are knowledgeable about the history of the treatment of lesbians and gay men in America. They are George Chauncey, Nancy F. Cott, John D'Emilio, Estelle B. Freedman, Thomas C. Holt, John Howard, Lynn Hunt, Mark D. Jordan, Elizabeth Lapovsky Kennedy, and Linda P. Kerber. Various *amici* have taught, conducted research, and published in the fields of the history of sexual regulation, including the history of sodomy laws; the history of discrimination based on sexuality, race, and gender; and American social and cultural history from the colonial period through the twentieth century. A summary of the qualifications and affiliations of the individual *amici* is provided in the appendix to this brief. *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici, as historians, do not propose to offer the Court legal doctrine to justify a holding that the Texas Homosexual Conduct Law violates the U.S. Constitution. Rather, *amici* believe they can best serve the Court by elaborating on two *historical* propositions important to the legal analysis: (1) no consistent historical practice singles out same-sex behavior as "sodomy" subject to proscription, and (2) the governmental policy of classifying and discriminating against certain citizens on the basis of their homosexual status is an unprecedented project of the twentieth

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

century, which is already being dismantled. The Texas law at issue is an example of such irrational discrimination.

In colonial America, regulation of non-procreative sexual practices – regulation that carried harsh penalties but was rarely enforced – stemmed from Christian religious teachings and reflected the need for procreative sex to increase the population. Colonial sexual regulation included such non-procreative acts as masturbation, and sodomy laws applied equally to male-male, male-female, and human-animal sexual activity. "Sodomy" was not the equivalent of "homosexual conduct." It was understood as a particular, discrete, act, not as an indication of a person's sexuality or sexual orientation.

Not until the end of the nineteenth century did lawmakers and medical writing recognize sexual "inversion" or what we would today call homosexuality. The phrase "homosexual sodomy" would have been literally incomprehensible to the Framers of the Constitution, for the very concept of homosexuality as a discrete psychological condition and source of personal identity was not available until the late 1800s. The Court in *Bowers* v. *Hardwick* misapprehended this history.

Proscriptive laws designed to suppress all forms of non-procreative and non-marital sexual conduct existed through much of the last millennium. Widespread discrimination against a class of people on the basis of their homosexual status developed only in the twentieth century, however, and peaked from the 1930s to the 1960s. Gay men and women were labeled "deviants," "degenerates," and "sex criminals" by the medical profession, government officials, and the mass media. The federal government banned the employment of homosexuals and insisted that its private contractors ferret out and dismiss their gay employees, many state governments prohibited gay people from being served in bars and restaurants, Hollywood prohibited the discussion of gay issues or the appearance of gay or lesbian characters in its films, and many municipalities launched police

campaigns to suppress gay life. The authorities worked together to create or reinforce the belief that gay people were an inferior class to be shunned by other Americans. Sodomy laws that exclusively targeted same-sex couples, such as the statute enacted in 1973 in Texas (1973 TEX. GEN. LAWS ch. 399, §§ 1, 3), were a development of the last third of the twentieth century and reflect this historically unprecedented concern to classify and penalize homosexuals as a subordinate class of citizens.

Since the 1960s, however, and especially since the *Bowers* decision in 1986, official and popular attitudes toward homosexuals have changed, though vestiges of old attitudes – such as the law at issue here – remain. Among other changes, the medical profession no longer stigmatizes homosexuality as a disease, prohibitions on employment of homosexuals have given way to antidiscrimination protections, gay characters have become common in movies and on television, 86 percent of Americans support gay rights legislation, and family law has come to recognize gays and lesbians as part of non-traditional families worthy of recognition. These changes have not gone uncontested, but a large majority of Americans have come to oppose discrimination against lesbians and gay men.

In this case, the Court should construe the Equal Protection Clause and the Due Process Clause with a thorough and nuanced history of the subject in mind.

ARGUMENT

I. *BOWERS* v. *HARDWICK* RESTS ON A FUNDAMENTAL MISAPPREHENSION OF THE HISTORY OF SODOMY LAWS

In *Bowers* v. *Hardwick*, this Court concluded, by a 5-4 vote, that the Constitution does not confer a fundamental right to engage in "homosexual sodomy." The majority's conclusion was based, in large measure, on the "ancient roots" of laws prohibiting homosexuals from engaging in acts of consensual

sodomy. 478 U.S. 186, 192 (1986). The Court stated that in 1791 "sodomy" "was forbidden by the laws of the original thirteen States," that in 1868 "all but 5 of the 37 States in the Union had criminal sodomy laws," and that, "until 1961, all 50 States outlawed sodomy." *Id.* at 192-193. Accordingly, the Court reasoned, the right of homosexuals to engage consensually in the acts that have been labeled "sodomy" is not "deeply rooted in this Nation's history and tradition." *Id.* at 192-194. In a concurring opinion, Chief Justice Burger relied on a similar historical interpretation. In his view, "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization." *Id.* at 196. To consider the right to engage in homosexual sodomy a fundamental right, Chief Justice Burger wrote, "would be to cast aside millennia of moral teaching." *Id.* at 197.

Recent historical scholarship demonstrates the flaws in the historical accounts endorsed by the Court and Chief Justice Burger. We concur with the accounts given of the history of sodomy laws and of their enforcement in colonial America and the United States by the American Civil Liberties Union and the Cato Institute in their amicus briefs. We will not endeavor to replicate their historical accounts here, but we do wish to stress two points about this history.

First, contrary to the Court's assumption in *Bowers*, sodomy prohibitions have varied enormously in the last millennium (and even since our own colonial era) in their definition of the offense and in their rationalization of its prohibition. The specification of "homosexual sodomy" as a criminal offense does not carry the pedigree of the ages but is almost exclusively an invention of the recent past.

Prohibitions against sodomy are rooted in the teachings of Western Christianity, but those teachings have always been strikingly inconsistent in their definition of the acts encompassed by the term. When the term "sodomy" was first empha-

sized by medieval Christian theologians in the eleventh century, they applied it inconsistently to a diverse group of non-procreative sexual practices. In subsequent Latin theology, canon law, and confessional practice, the term was notoriously confused with "unnatural acts," which had a very different origin and ranged even more widely (to include, for example, procreative sexual acts in the wrong position or with contraceptive intent). "Unnatural acts" is the older category, because it comes directly from Paul in *Romans* 1, but Paul does not associate such acts with (or even mention) the story of Sodom (*Genesis* 19) and appears not to have considered that story to be concerned with same-sex activity. (Cf. *Ezekiel* 16:49-50, where the sin of Sodom is the arrogant and inhospitable refusal to share wealth and leisure.)

Later Christian authors did combine *Romans* 1 with *Genesis* 19, but they could not agree on what sexual practices were meant by either "unnatural acts" or "sodomy." For example, in Peter Damian, who around 1050 championed the term "sodomy" as an analogy to "blasphemy," the "sins of the Sodomites" include solitary masturbation. In Thomas Aquinas, about two centuries later, "unnatural acts" cover every genital contact intended to produce orgasm except penile-vaginal intercourse in an approved position. See MARK D. JORDAN, THE INVENTION OF SODOMY IN CHRISTIAN THEOLOGY 46, 144-145 (1997). Many later Christian writers denied that women could commit sodomy at all; others believed that the defining characteristic of unnatural or sodomitic sex was that it could not result in procreation, regardless of the genders involved. See MARK D. JORDAN, THE SILENCE OF SODOM 62-71 (2000). In none of these authors does the term "sodomy" refer systematically and exclusively to same-sex conduct. Certainly it was not used consistently through the centuries to condemn that conduct. The restrictive use of the term in the Texas law at issue must itself be regarded as a historically recent innovation.

The English Reformation Parliament of 1533 turned the religious injunction against sodomy into the secular crime of buggery when it made "the detestable and abominable vice of buggery committed with mankind or beast" punishable by death. The English courts interpreted this to apply to sexual intercourse between a human and animal and anal intercourse between a man and woman as well as anal intercourse between two men. See William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1012 (1997); Ed Cohen, *Legislating the Norm: From Sodomy to Gross Indecency*, 88 S. ATLANTIC Q. 181, 185 (1989).

Colonial American statutes variously drew on the religious and secular traditions and shared their imprecision in the definition of the offense. Variously defining the crime as (the religious) sodomy or (the secular) buggery, they generally proscribed anal sex between men and men, men and women, and humans and animals, but their details and their rationale varied, and the New England colonies penalized a wider range of "carnall knowledge," including (but by no means limited to) "men lying with men." Puritan leaders in the New England colonies were especially vigorous in their denunciation of sodomitical sins as contrary to God's will, but their condemnation was also motivated by the pressing need to increase the population and to secure the stability of the family. Thus John Winthrop mused that the main offense of one man hanged in New Haven in 1646 for having engaged in masturbation with numerous youths – not, in other words, for "sodomy" as it is usually understood today – was his "frustratinge of the Ordinance of marriage & the hindringe the generation of mankinde." See John Murrin, *"Things Fearful to Name": Bestiality in Early America*, *in* AMERICAN SEXUAL HISTORIES 17 (Elizabeth Reis ed., 2001); see also Robert F. Oaks, *"Things Fearful to Name": Sodomy and Buggery in Seventeenth-century New England*, 12 J. SOC.

HIST. 268 (1978); JONATHAN NED KATZ, *The Age of Sodomitical Sin, 1607-1740, in* GAY/LESBIAN ALMANAC 23 (1983).

Another indication that the sodomy statutes were not the equivalent of a statute against "homosexual conduct" is that with one brief exception they applied exclusively to acts performed by men, whether with women, girls, men, boys, or animals, and not to acts committed by two women. Only the New Haven colony penalized "women lying with women," and this for only ten years. For the entire colonial period we have reports of only two cases involving two women engaged in acts with one another. As one historian notes, both cases "were treated as lewd and lascivious behavior, not as potential crimes against nature." See Murrin at 15; KATZ, GAY/LESBIAN ALMANAC, at 29-30.

Statutes enacted in the early decades after independence followed the English authorities, but by the mid-nineteenth century most statutes defined the offense as a crime against nature rather than as a crime against God. Such statutes were still not the equivalent of a statute proscribing "homosexual conduct." In 1868, no statute criminalized oral sex, whether between two men, two women, or a man and woman. See William Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 656.

It was only beginning in the 1970s that a handful of States, including Texas, passed legislation specifying homosexual sodomy while decriminalizing heterosexual sodomy. This legislation had no historical precedent, but resulted from a uniquely twentieth-century form of animus directed at homosexuals, which will be detailed in the next section of this brief.

Second, throughout American history, the authorities have rarely enforced statutes prohibiting sodomy, however defined. Even in periods when enforcement increased, it was rare for people to be prosecuted for consensual sexual relations conduct-

ed in private, even when the parties were of the same sex. Indeed, records of only about twenty prosecutions and four or five executions have surfaced for the entire colonial period. Even in the New England colonies, whose leaders denounced "sodomy" with far greater regularity and severity than did other colonial leaders and where the offense carried severe sanctions, it was rarely prosecuted. The trial of Nicholas Sension, a married man living in Westhersfield, Connecticut, in 1677, revealed that he had been widely known for soliciting sexual contacts with the town's men and youth for almost forty years but remained widely liked. Likewise, a Baptist minister in New London, Connecticut, was temporarily suspended from the pulpit in 1757 because of his repeatedly soliciting sex with men, but the congregation voted to restore him to the ministry after he publicly repented. They understood his sexual transgressions to be a form of sinful behavior in which anyone could engage and from which anyone could repent, not as a sin worthy of death or the condition of a particular class of people. See Richard Godbeer, *"The Cry of Sodom": Discourse, Intercourse, and Desire in Colonial New England*, 3.52 WM. & MARY Q. 259, 259-260, 275-278 (1995); Eskridge, 1999 U. ILL. L. REV. at 645; JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 30 (2d ed. 1997).

The relative indifference of the public and the authorities to the crime of sodomy continued in the first century of independence. For instance, only twenty-two men were indicted for sodomy in New York City in the nearly eight decades from 1796 to 1873. D'EMILIO & FREEDMAN, INTIMATE MATTERS 123. The number of sodomy prosecutions increased sharply in the last two decades of the nineteenth century and in the twentieth century. This was made possible by the decision of many States to criminalize oral intercourse for the first time. But it resulted in large measure from the pressure applied on district attorneys by privately organized and usually religiously inspired anti-vice societies, whose leaders feared that the growing size and

complexity of cities had loosened the constraints on sexual conduct and increased the vulnerability of youth and the disadvantaged. The increase in sodomy prosecutions was only one aspect of a general escalation in the policing of sexual activity, which also included stepped-up campaigns against prostitution, venereal disease, and contraception use. Although in this context a growing number of sodomy prosecutions involved adult males who had engaged in consensual relations, most such relations had taken place in semi-public spaces rather than in the privacy of the home, and the great majority of cases continued to involve coercion and/or minor boys or girls. See D'EMILIO & FREEDMAN, INTIMATE MATTERS 150-156, 202-215; GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 137-141 (1994); PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920 (1978); Eskridge, 1999 U. ILL. L. REV. at 655-659.

Thus, the majority in *Bowers* misinterpreted the historical record. Laws singling out sexual (or "sodomitical") conduct between partners of the same sex for proscription are an invention of our time, not the legacy of "millennia of moral teaching." And in practice, regulating sodomy has never been a major concern of the state or the public.

When reexamining a prior holding, this Court ordinarily considers "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 855 (1992). See also *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 574-575 (1993) (Souter, J., concurring in part) (arguing that recent historical scholarship correcting incomplete historical assessments by the Court justifies reexamination of constitutional precedent). Because, in this case, historical scholarship demonstrates that the use of sodomy laws to regulate exclusively same-sex behavior and to restrict

homosexuals is a recent invention, this Court should reconsider its earlier opinion in *Bowers*, which rested on an inaccurate historical assessment. And, at the very least, it should recognize that Texas's singling out of same-sex sodomy for prohibition lacks a significant historical pedigree.

Furthermore, in its analysis of the Equal Protection Clause issue in this case, the Court should recognize what the foregoing history shows: sodomy laws have not only varied in content over time, but have also depended on the kinds of status-based distinctions and shifting justifications that are typical of irrational discrimination. Neither millennia of moral teachings nor the American experience teach *any* consistent message about which sexual practices between consenting adults should be condemned and why. Rather, the unprecedented enactment in recent decades of sodomy laws that exclusively penalize homosexual conduct is one indication of the growth of a uniquely twentieth-century form of discrimination.

II. DISCRIMINATION ON THE BASIS OF HOMOSEXUAL STATUS WAS AN UNPRECEDENTED DEVELOPMENT OF THE TWENTIETH CENTURY

Over the generations, sodomy legislation proscribed a diverse and inconsistent set of sexual acts engaged in by various combinations of partners. Above all, it regulated *conduct* in which *anyone* (or, at certain times and in certain places, any male person) could engage. Only in the late nineteenth century did the idea of the homosexual as a distinct category of person emerge, and only in the twentieth century did the state begin to classify and penalize citizens on the basis of their identity or *status* as homosexuals. The States began to enact discriminatory measures in the 1920s and 1930s, but such measures and other forms of anti-gay harassment reached a peak in the twenty years following the Second World War, when government agencies systematically discriminated against homosexuals.

The unprecedented decision of Texas and several other states, primarily in the 1970s, to enact sodomy laws singling out "homosexual sodomy" for penalty, is best understood historically in the context of these discriminatory measures. The new sodomy laws essentially recast the historic purpose of such laws, which had been to regulate conduct generally, by adding them to the array of discriminatory measures directed specifically against homosexuals. Such discriminatory measures against homosexuals, although popularly imagined to be longstanding, are in fact not ancient but a unique and relatively short-lived product of the twentieth century.

It was only in the late nineteenth century that the very concept of the homosexual as a distinct category of person developed. The word "homosexual" appeared for the first time in a German pamphlet in 1868, and was introduced to the American lexicon only in 1892. JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY 10 (1995).[2] As Michel Foucault has famously described this evolution, "the sodomite had been a temporary aberration; the homosexual was now a species." 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 43 (Robert Hurley trans. 1978).

The discriminatory measures we will describe responded to the growing visibility of gay and lesbian subcultures in American cities in the late nineteenth and early twentieth centuries. It should be noted, though, that many Americans responded to gay life with fascination and sympathy. Many people regarded the increasing visibility of gay life as simply one more sign of the growing complexity and freedom from tradition of a burgeoning metropolitan culture. Thousands of New Yorkers attended the drag balls organized by gay men in Harlem in the 1920s and 30s, for instance, and two of the most

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[2] For a detailed philological explication, see DAVID HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 15 & n.155 (1990).

successful nightclubs in Times Square in 1931 featured openly gay entertainers. See CHAUNCEY, GAY NEW YORK 258, 320.

Others regarded the growing visibility of lesbian and gay life with dread. Hostility to homosexuals was sometimes motivated by an underlying uneasiness about the dramatic changes underway in gender roles at the turn of the last century. Conservative physicians initially argued that the homosexual (or "sexual invert") was characterized as much by his or her violation of conventional gender roles as by specifically sexual interests. At a time when many doctors argued that women should be barred from most jobs because employment would interfere with their ability to bear children, numerous doctors identified women's challenges to the limits placed on their sex as evidence of a medical disorder. Thus doctors explained that "the female possessed of masculine ideas of independence" was a "degenerate" and that "a decided taste and tolerance for cigars, * * * [the] dislike and incapacity for needlework * * * and some capacity for athletics" were all signs of female "sexual inversion." George Chauncey, *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, SALMAGUNDI, Fall 1982/Winter 1983, at 114, 120-121 (quoting HAVELOCK ELLIS, SEXUAL INVERSION (3d rev. ed. 1915); see *ibid.* (citing W.L. Howard, *Effeminate Men and Masculine Women*, N.Y. MEDICAL J. 71 (1900)). Similarly, another doctor thought it significant that a male "pervert" "never smoked and never married; [and] was entirely averse to outdoor games." *Id.* at 120 (quoting W.C. Rivers, *A New Male Homosexual Trait (?)*, ALIENIST & NEUROLOGIST 41 (1920)). See also Charles Rosenberg & Carroll Smith-Rosenberg, *The Female Animal: Medical and Biological Views of Women*, 60 J. AM. HISTORY 332 (1973).

Such views lost their credibility once public opinion had come to accept significant changes in women's roles in the workplace and political sphere, but doctors continued for several

more decades to identify homosexuality per se as a "disease," "mental defect," "disorder," or "degeneration." Until the American Psychiatric Association removed homosexuality from its list of disorders in 1973, such hostile medical pronouncements provided a powerful source of legitimation to anti-homosexual sentiment, just as medical science had previously legitimized widely held (and subsequently discarded) beliefs about male superiority and white racial superiority. See Chauncey, SALMAGUNDI at 129, 133, 137, 141; Siobhan Somerville, *Scientific Racism and the Invention of the Homosexual Body*, *in* QUEER STUDIES 241 (Beemyn & Eliason eds., 1996); D'EMILIO & FREEDMAN, INTIMATE MATTERS 122, 226; JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY (1999).

Anti-vice societies organized in the late nineteenth century also opposed the growing visibility of homosexuality, which they regarded as an egregious sign of the loosening of social controls on sexual expression in the cities. They encouraged the police to step up harassment of gay life as simply one more part of their campaigns to shut down dance halls and movie theaters, prohibit the consumption of alcohol and the use of contraceptives, dissuade restaurants from serving an interracial mix of customers, and otherwise impose their vision of the proper social order and sexual morality. As a result of this pressure, the police began using misdemeanor charges, such as disorderly conduct, vagrancy, lewdness, loitering, and so forth to harass homosexuals. These state misdemeanor or municipal offense laws, which carried fewer procedural protections, allowed further harassment of individuals engaged in same-sex intimacy. See D'EMILIO & FREEDMAN, INTIMATE MATTERS 150-156, 202-215; CHAUNCEY, GAY NEW YORK 137-141, 183-186, 197-198, 249-250; BOYER, URBAN MASSES 191-219.

In some cases, state officials tailored these laws to strengthen the legal regulation of homosexuals. For example, in 1923

the New York State legislature specified for the first time one man's "frequent[ing] or loiter[ing] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" as a form of disorderly conduct. CHAUNCEY, GAY NEW YORK 172. Many more men were arrested and prosecuted under this misdemeanor charge than for sodomy. Between 1923 and 1967, when Mayor John Lindsay ordered the police to stop using entrapment to secure arrests of gay men, more than 50,000 men had been arrested on this charge in New York City alone. George Chauncey, *A Gay World, Vibrant and Forgotten*, N.Y. TIMES, June 26, 1994, at E17.

Even this stepped-up policing of gay life fails to anticipate the scale of the discrimination against homosexuals put in place in the twentieth century, especially between the 1930s and 1960s. In the early years of the Great Depression, restrictions on gay life intensified. New regulations curtailed gay people's freedom of association. In New York State, for instance, the State Liquor Authority established after the Repeal of Prohibition issued regulations prohibiting bars, restaurants, cabarets, and other establishments with liquor licenses from employing or serving homosexuals or allowing homosexuals to congregate on their premises. CHAUNCEY, GAY NEW YORK 173, 337. The Authority's rationale was that the mere presence of homosexuals made an establishment "disorderly," and when the courts rejected that argument the Authority began using evidence of unconventional gender behavior or homosexual solicitation gathered by plainclothes investigators to provide proof of a bar's disorderly character. *Id.* at 337. Hundreds of bars were closed in the next thirty years in New York City alone. *Id.* at 339.

Similar regulations were introduced around the country in subsequent years. In California in the 1950s, notes one historian, the Alcoholic Beverage Control Board "collapsed the difference between homosexual status (a state of being) and conduct (behavior) and suggested that any behavior that

signified homosexual status could be construed as an illegal act. Simple acts such as random touching, mannish attire (in the case of lesbians), limp wrists, high pitched voices, and/or tight clothing (in the case of gay men) became evidence of a bar's dubious character" and grounds for closing it. NAN ALAMILLA BOYD, WIDE OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO (forthcoming 2003) (manuscript at 159). For similar policies elsewhere, see, *e.g.*, ELIZABETH LAPOVSKY KENNEDY & MADELINE DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY 145-146 (1993).

Other regulations curtailed gay people's freedom of speech and the freedom of all Americans to discuss gay issues. The Hollywood studios, under pressure from a censorship movement led by religious (primarily Catholic) leaders, established a production code that from 1934 on prohibited the inclusion of gay or lesbian characters, discussion of homosexual issues, or even the "inference" of "sex perversion" in Hollywood films. This censorship code remained in effect for some thirty years and effectively prohibited the discussion of homosexuality in the most important medium of the mid-twentieth century. See CHAUNCEY, GAY NEW YORK 353 & n.57. See generally GREGORY BLACK, THE CATHOLIC CRUSADE AGAINST THE MOVIES, 1940-1975 (1997); GREGORY D. BLACK, HOLLYWOOD CENSORED: MORALITY CODES, CATHOLICS, AND THE MOVIES (1994); VITO RUSSO, THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES (1991).

The persecution of gay men and lesbians dramatically increased at every level of government after the Second World War. In 1950, following Senator Joseph McCarthy's denunciation of the employment of gay persons in the State Department, the Senate conducted a special investigation into "the employment of homosexuals and other sex perverts in government." S. REP. NO. 241 (1950). The Senate Committee recommended excluding gay men and lesbians from all government service

because homosexual acts violated the law. *Id.* at 3. The Committee also cited the general belief that "those who engage in overt acts of perversion lack the emotional stability of normal persons," *id.* at 4, and that homosexuals "constitute security risks," *id.* at 5.[3] It also portrayed homosexuals as predators: "[T]he presence of a sex pervert in a Government agency tends to have a corrosive influence on his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. Government officials have the responsibility of keeping this type of corrosive influence out of the agencies under their control. * * * One homosexual can pollute a Government office." *Id.* at 4.

The Senate investigation and report were only one part of a massive anti-homosexual campaign launched by the federal government after the war. The Senate Committee reported that "[a] spot check of the records of the Civil Service Commission indicates that between January 1, 1947, and August 1, 1950, approximately 1,700 applicants for Federal positions were denied employment because they had a record of homosexuality or other sex perversion." S. REP. 241 at 9. In 1953, President Eisenhower issued an executive order requiring the discharge of homosexual employees from federal employment, civilian or military. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE

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[3] As historian David Johnson noted, however, the Senate Committee "could only uncover one example of a homosexual who was blackmailed into betraying his country, and for that, investigators had to reach back to World War I and beyond America's shores, to a Captain Raedl, chief of the Australian Counterintelligence Service in 1912." David Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, WASH. HISTORY, Fall/Winter 1994-95, at 45, 48.

UNITED STATES, 1940-1970, at 44 (1983). Thousands of men and women were discharged or forced to resign from civilian and military positions because they were suspected of being gay or lesbian. *Ibid.*; ROBERT D. DEAN, IMPERIAL BROTHERHOOD: GENDER AND THE MAKING OF COLD WAR FOREIGN POLICY (2001).

In addition, President Eisenhower's executive order required defense contractors and other private corporations with federal contracts to ferret out and discharge their homosexual employees. David Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, WASH. HISTORY, Fall/Winter 1994-95, at 45, 53. "Other private industries adopted the policies of the federal government * * * even though they had no direct federal contracts." *Ibid.* Furthermore, the FBI initiated a widespread system of surveillance to enforce the executive order. As one historian has noted, "The FBI sought out friendly vice squad officers who supplied arrest records on morals charges, regardless of whether convictions had ensued. Regional FBI officers gathered data on gay bars, compiled lists of other places frequented by homosexuals, and clipped press articles that provided information about the gay world. * * * Federal investigators engaged in more than fact-finding; they also exhibited considerable zeal in using information they collected." D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 46-47.

The official harassment of homosexuals received further legitimation from a series of press and police campaigns in the 1930s, 1940s, and 1950s that fomented demonic stereotypes of homosexuals as child molesters. "Despite the lack of evidence that the incidence of rape, child murder, or minor sex offenses had increased," these press campaigns "led to demands that the state crack down on sex crimes." Estelle Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920-1960*, 74 J. AM. HISTORY 83, 92 (1987). See also George

Chauncey, *The Postwar Sex Crime Panic, in* TRUE STORIES FROM THE AMERICAN PAST 172 (William Graebner ed., 1993). "The majority of cases of child 'sex murders' reported by the press involved men attacking girls. But * * * numerous articles warned that in breaking with social convention to the extent necessary to engage in homosexual behavior, a man had demonstrated the refusal to adjust to social norms that was the hallmark of the psychopath * * *." CHAUNCEY, GAY NEW YORK 359. "As a result of such press campaigns, the long-standing public image of the queer as an effeminate fairy whom one might ridicule but had no reason to fear was supplemented by the more ominous image of the queer as a psychopathic child molester capable of committing the most unspeakable crimes against children." *Id.* at 359-360.

The new demonic stereotypes of homosexuals were used to justify draconian legislation. See Chauncey, *Sex Crime Panic* at 169, 171. In response to the public hysteria incited by such press campaigns, more than half the state legislatures enacted laws allowing the police to force persons who were convicted of certain sexual offenses, including sodomy – or, in some States, merely suspected of being "sexual deviants" – to undergo psychiatric examinations. The examinations could result in indeterminate civil confinements for individuals deemed in need of a "cure" for their homosexual "pathology." See Freedman, 74 J. AM. HISTORY at 95-98; Chauncey, *Sex Crime Panic* at 166-167, 177; MARC STEIN, CITY OF SISTERLY AND BROTHERLY LOVES: LESBIAN AND GAY PHILADELPHIA, 1945-1972, at 124-125 (2000).

The government campaign against lesbians and gay men was waged at the local level as well. "The labeling of homosexuals as moral perverts and national security risks, along with the repressive policies of the federal government, encouraged local police forces across the country to harass them with impunity." D'EMILIO & FREEDMAN, INTIMATE MATTERS

293. In the decade following World War II, the police departments of numerous cities stepped up their raids on bars and private parties attended by gay and lesbian persons, and made thousands of arrests for "disorderly conduct." "Arrests were substantial in many cities. In the District of Columbia they topped 1,000 per year during the early 1950s; in Philadelphia, misdemeanor charges against lesbians and homosexuals averaged 100 per month. * * * New York, New Orleans, Dallas, San Francisco and Baltimore were among the cities that witnessed sudden upsurges in police action against homosexuals and lesbians in the 1950s." John D'Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America, in* PASSION AND POWER: SEXUALITY IN HISTORY 231 (Peiss & Simmons eds., 1989).

In some parts of the country, hostility to gay men approached hysteria. In 1955, for example, there was an extensive investigation of gay men in Boise, Idaho. Fourteen hundred people were interrogated and coerced into identifying the names of other gay residents. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 51; JOHN GERASSI, THE BOYS OF BOISE: FUROR, VICE, AND FOLLY IN AN AMERICAN CITY (1966).

Countless state employees, teachers, hospital workers, and others lost their jobs as a result of official policy. Beginning in 1958, for instance, the Florida Legislative Investigation Committee, which had been established by the legislature in 1956 to investigate and discredit civil rights activists, turned its attention to homosexuals working in the State's universities and public schools. Its initial investigation of the University of Florida resulted in the dismissal of fourteen faculty and staff members, and in the next five years it interrogated some 320 suspected gay men and lesbians. It "pressured countless others into relinquishing their teaching positions, and had many students quietly removed from state universities." Stacy Braukman, *"Nothing Else Matters But Sex": Cold War Narra-*

tives of Deviance and the Search for Lesbian Teachers in Florida, 1959-1963, 27 FEMINIST STUDIES 553, 555 (2001); see also *id.* at 553-557, 573 & n.3. Its 1959 report to the legislature called the extent of homosexual activity in the State's school system "absolutely appalling." *Id.* at 561. See also James A. Schnur, *Closet Crusaders: The Johns Committee and Homophobia, 1956-1965, in* CARRYIN' ON IN THE LESBIAN AND GAY SOUTH 132-163 (John Howard ed., 1997).

Lesbians, gay men, and their supporters challenged police harassment and state discrimination throughout this period, but with little success before the 1960s and 1970s. Through much of the twentieth century, gay men and lesbians suffered under the weight of medical theories that treated their desires as a disorder, penal laws that condemned their sexual behavior as a crime, and federal policies and state regulations that discriminated against them on the basis of their homosexual status. These state practices and ideological messages worked together to create or reinforce the belief that gay persons were an inferior class to be shunned by other Americans. Such forms of discrimination, harassment, and stigmatization were so pervasive and well established by the 1960s that it was widely imagined that they were the inevitable "residue of an age-old, unchanging social antipathy toward homosexuality." CHAUNCEY, GAY NEW YORK 355. But recent historical scholarship tells a different story. Discrimination on the basis of homosexual status was a powerful but unprecedented development of the twentieth century. Public conceptions and attitudes had changed, and they would change again.

III. TOLERANCE TOWARD HOMOSEXUALS HAS INCREASED, RESULTING IN ACCEPTANCE BY MANY, BUT NOT ALL, MAINSTREAM INSTITUTIONS

Since the 1960s, official and popular attitudes toward homosexuals have changed significantly, with a dramatic attitudinal shift since *Bowers* was decided in 1986. Homosexuality remains a contentious moral and political issue and we still live with the legacy of the many discriminatory measures put in place between the 1930s and 1960s, but a significant number of those measures have been repealed in recent years as large segments of the American public have become more understanding and accepting of lesbians and gay men.

The widespread consensus in the first half of the twentieth century that homosexuality was pathological and dangerous has given way, with growing numbers of expert and ordinary Americans regarding it as a normal and benign variation of human sexuality. Major institutions that once helped legitimize anti-gay hysteria have changed their positions. Medical writers and mental health professionals whose stigmatization of homosexuality as a disease or disorder had been used to justify discrimination for decades – as discussed in Part II above – were among the first to change their views. In 1973, the American Psychiatric Association voted to remove homosexuality from its list of mental disorders. Gary B. Melton, *Public Policy and Private Prejudice*, 44 AM. PSYCHOLOGIST 933, app. A, at 936 (1989) (citing Resolution of the American Psychiatric Association, Dec. 15, 1973). The American Psychological Association and the American Medical Association soon followed suit. See Resolution of the Council of Representatives of the American Psychological Association, 30 AM. PSYCHOLOGIST 633 (1975).

Religious attitudes toward homosexuals and homosexuality also began to change. The place of lesbians and gay men in religious life is still vigorously debated, but since the 1970s many mainline Protestant denominations have issued official statements condemning legal discrimination against homosexuals and affirming that homosexuals ought to enjoy equal protection under criminal and civil law. Several of these groups descended from the historically influential denominations whose

religious authority had been invoked to justify colonial statutes against sodomy. Early statements include those by the Lutheran Church in America (1970), the Unitarian Universalist Association (1970), the United Methodist Church (1972), the United Church of Christ (1975), the Protestant Episcopal Church (1976), the Disciples of Christ (1977), the United Presbyterian Church in the U.S.A. (1978), and the American Lutheran Church (1980).[4]

The federal government, which once prohibited the employment of homosexuals, now prohibits its agencies from discriminating against them in employment. The U.S. Civil Service Commission lifted its ban on the employment of gay men and lesbians in 1975. D'EMILIO & FREEDMAN, INTIMATE

[4] Statements in support of equal legal protection for homosexual persons were also adopted by the Central Conference of American Rabbis and the Union of American Hebrew Congregations as early as 1977. See Lutheran Church in America, Social Statement: Sex, Marriage, and Family (5th Biennial Convention 1970); United Methodist Church, Revision of "Social Principles" (Gen. Conf. 1972), codified in Book of Discipline of the United Methodist Church ¶ 162H (2000); United Church of Christ, Pronouncement on Civil Liberties Without Discrimination Related to Affectional or Sexual Preference (10th General Synod 1975); Protestant Episcopal Church (now Episcopal Church), Resolution A-71: Support Right of Homosexual to Equal Protection of the Law (65th Gen. Conv. 1976), *in* Journal of the General Convention of The Episcopal Church, Minneapolis 1976, at C-109 (1977); Christian Church (Disciples of Christ), Resolution 7747 (Gen. Assembly 1977); 1 United Presbyterian Church in the U.S.A. (now Presbyterian Church [U.S.A.]), Minutes of the 190th General Assembly 265-266 (1978); American Lutheran Church, Human Sexuality and Sexual Behavior G(5) (10th Gen. Conv. 1980); Central Conference of American Rabbis, Resolution on "Rights of Homosexuals" (88th Ann. Conf. 1977); Union of American Hebrew Congregations, Resolution on "Human Rights of Homosexuals" (54th Gen. Assembly 1977).

MATTERS 324. President Clinton signed executive orders banning discrimination in the federal workplace on the basis of sexual orientation, Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998), and barring the use of sexual orientation as a criterion for determining security clearance, Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995). Hundreds of companies have adopted similar measures. A survey of 319 of America's largest companies found that approximately "92 percent of the firms surveyed prohibit workplace discrimination against gays and lesbians." Kirstin Downey Grimsley, *Rights Group Rates Gay-Friendly Firms*, WASH. POST, Aug. 14, 2002.

A substantial number of States and cities have prohibited discrimination based on sexual orientation. Thirteen States, eleven of them since 1990, and the District of Columbia have passed laws banning discrimination on the basis of sexual orientation.[5] National Gay & Lesbian Taskforce, GLBT Civil Rights Laws in the U.S., *available at* http://www.ngltf.org. More than 140 cities have similarly acted to prohibit discrimination based on sexual orientation. Wayne van der Meide, Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States (National Gay & Lesbian Taskforce 2000).

With the lifting of censorship and the growing interest in gay people and issues, there has been a dramatic increase in the coverage of gay issues in the media and in the number of gay characters in the movies and on television. "In Hollywood, Tom

[5] CAL. GOV'T CODE § 12920; CONN. GEN. STAT. § 46a-81c; D.C. CODE ANN.§§ 2-1401, 2-1402; HAW. REV. STAT. §§ 368-1, 368-2; MD. ANN. CODE art. 49B, § 14; MASS. GEN. LAWS ch. 151B, §§ 3, 4; MINN. STAT. § 363.12; NEV. REV. STAT. 613.330; N.H. REV. STAT. ANN. § 354-A:6; N.J. STAT. ANN. § 10:5-3; 2002 N.Y. Laws Ch. 2 (A.1971); R.I. GEN. LAWS § 28-5-2; VT. STAT. ANN. tit. 21, § 495; WIS. STAT. §§ 11.322, 11.325, 11.36.

Hanks received an Oscar for portraying a gay man with AIDS and then thanked his gay high school drama teacher before a worldwide viewing audience." D'EMILIO & FREEDMAN, INTIMATE MATTERS 368. One of the most popular television series of the last several years, *Will & Grace* (NBC), features two gay characters in leading roles, and 28 other series in the 2001-2002 season featured major gay or lesbian characters. See Gay & Lesbian Alliance Against Defamation, Where We Are on TV, *available at* http://www.glaad.org/eye/ontv/index.php. This has dramatically changed the dominant representation of homosexuals. Gay people usually appeared in the media in the 1950s only as shadowy and dangerous figures, as discussed in Part II above, but they now appear as a diverse and familiar group whose all-too-human struggles and pleasures draw the interest of large viewing audiences.

It is not only in the media that heterosexuals see homosexuals. The growing openness of lesbians and gay men about their sexual orientation since the 1970s has had a tremendous impact on their relatives, friends, neighbors, and co-workers. Growing numbers of heterosexuals realize that some of the people they most love and respect are gay. "Anywhere from half to three quarters of Americans know someone who is homosexual * * *." Frank Newport, Gallup Poll News Service, Homosexuality, Sept. 2002, *available at* http://www.gallup.com/poll. As a result, acceptance of gays has increased. See Joan Biskupic, *For Gays, Tolerance Translates To Rights*, WASH. POST, Nov. 5, 1999 ("The prevailing national sentiment * * * is one of tolerance toward sexual variation.").

Even those who are hostile to or made uneasy by homosexuality are against discrimination and intolerance. A 2002 Gallup Poll found that, while 44 percent of the people said homosexuality was unacceptable, 86 percent of those surveyed said homosexuals should have equal rights in terms of job opportunities. Newport, Gallup Poll, *supra*. Only 56 percent of

Americans supported gay rights legislation in 1977. The figure jumped to 83 percent in 1989, and increased to 86 percent in 2002. *Ibid.*

A growing number of businesses, universities, and state and municipal governments have recognized that many gay people are members of families and share the same family responsibilities other Americans do. More than 5,389 companies now offer health insurance and other benefits to the same-sex domestic partners of their employees, as do 151 state or local governments. Only four companies and three governmental units did so in 1986. Human Rights Campaign, WorkNet Database, *available at* http://www.hrc.org/worknet/dp/index.asp. More than two-thirds of the Nation's largest companies offer health benefits to same-sex partners, *What's News*, WALL ST. J., Aug. 14, 2002, including Coca-Cola and the big three automakers, *Business Brief*, WALL ST. J., June 23, 2000. President Bush recently signed legislation – named after one of the gay heroes of September 11, 2001 – allowing death benefits to be paid to the domestic partners of firefighters and police officers who die in the line of duty. Mychal Judge Police & Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. No. 107-196, 116 Stat. 719 (June 24, 2002).

Gay men and lesbians who parent together or as individuals have also become more numerous and visible. This has led to greater familiarity with and acceptance of gay parents. The experience of family courts that consider the best interests of individual children is revealing. Over the several decades in which courts have considered the rights of gay, lesbian, and bisexual parents, experience has led the vast majority of States to adopt custody standards that are neutral as to sexual orientation. Stephanie R. Reiss, Meghan Wharton & Joanne Romero, *Child Custody and Visitation*, 1 GEO. J. GENDER & LAW 383, 392-397 (2000); see, *e.g.*, *Jacoby* v. *Jacoby*, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000). Acceptance has increased in part because re-

search studies have led numerous influential medical and mental health groups, including the American Academy of Pediatrics, to endorse nondiscriminatory standards. American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002). Florida's ban on adoption by gay individuals, FLA. STAT. ANN. § 63.042 (West 2001), is the only one of its kind. Courts in almost half the States have allowed second-parent adoptions by gay and lesbian partners, and this mechanism is also part of the Uniform Adoption Act. Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 934 (2000); see, *e.g.*, *In re Adoption of R.B.F.*, 569 Pa. 269, 803 A.2d 1195 (2002). In gay families in which there was no second-parent adoption but there was a clear agreement jointly to parent that the parties fulfilled, many courts have allowed the second parent to secure custody or visitation rights, see, *e.g.*, *Gestl* v. *Frederick*, 133 Md. App. 216, 754 A.2d 1087 (2000), and held them to corresponding child support obligations. *L.S.K.* v. *H.A.N.*, 2002 WL 31819231 (Pa. Super. Dec. 17, 2002).

In short, there are many indications that in the last generation, and especially in the last decade, the acceptance of lesbians and gay men as full and equal members of our society has become commonplace. The growing openness of gay people and the lessening of discrimination against them have not gone unchallenged, however. Their growing visibility and acceptance have prompted a sharp reaction by some groups, just as the gains of the black civil rights movement did in the 1950s and 1960s.

The defenders of the popular prejudice of any particular age, lacking any recognizably rational basis for the distinctions they draw, often resort to claiming they are endorsed by millen-

nia of moral teaching.[6] They also distort the meaning of equal protection of the laws. When the opponents of a proposed open housing law in Detroit organized a successful voter initiative against it in 1964, for instance, they argued that such anti-discrimination measures conferred "special privileges" on African-Americans. THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 227 (1997). Opponents of laws prohibiting discrimination on the basis of sexual orientation have advanced a similar claim. JOHN GALLAGHER & CHRIS BULL, PERFECT ENEMIES: THE BATTLE BETWEEN THE RELIGIOUS RIGHT AND THE GAY MOVEMENT 111-114 (1996).

Since the 1970s, national organizations advocating "traditional family values" have paid increasing attention to the issue of gay rights and many local groups have organized to fight gay rights ordinances. In 1977, singer Anita Bryant declared that her Baptist faith moved her to lead a successful campaign to rescind a gay rights ordinance that had been passed in Dade County,

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[6] "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Loving* v. *Virginia*, 388 U.S. 1, 3 (1967) (quoting trial judge's justification for banishing interracial married couple from Virginia for 25 years as a condition of suspending their criminal sentence under antimiscegenation law, which this Court held unconstitutional). But see Oral Arg. Tr. of *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), *quoted in* DAVID C. FREDERICK, SUPREME COURT AND APPELLATE ADVOCACY 45-46 (2003) (Solicitor General Cox: "We shall solve the problems as one people, and thus escape the consequences of the sins of the past, only if we act in the spirit of Lincoln's Second Inaugural: without malice, with charity, and perhaps above all, without that spirit of false self-righteousness that enables men who are not themselves without fault to point the finger at their fellows.").

Florida. See, *e.g.*, DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 292 (1999). In the next twenty years, scores of referenda were initiated to overturn such laws, almost four-fifths of them successful. GALLAGHER & BULL, PERFECT ENEMIES 16-20, 39-62, 97-124, 173-187; WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 131-132 (1999). One well-known example is Colorado's Amendment 2. In response to local ordinances banning discrimination on the basis of sexual orientation, the voters of Colorado adopted a referendum amending the state constitution to prohibit legislative, executive, or judicial action protecting gay men and lesbians. *Romer* v. *Evans*, 517 U.S. 620, 623-624 (1996). This Court determined that the Colorado amendment violated the Equal Protection Clause.

Additionally, laws permitting overt intolerance and discrimination against homosexuals, including same-sex sodomy laws in a handful of States, remain in force, with severe consequences for people's lives and livelihoods. For example, a review of twenty surveys conducted across America between 1980 and 1991 showed that between 16 and 44 percent of gay men and lesbians had experienced discrimination in employment. *Employment Discrimination on the Basis of Sexual Orientation: Hearings on S. 2238 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 2d Sess. 70 (1994) (statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy). Cheryl Summerville's separation notice from Cracker Barrel read: "This employee is being terminated due to violation of company policy. This employee is gay." *Id.* at 6. Labeling gay people criminals – as same-sex sodomy laws do – also leads to the imposition of many legal disabilities "because the law permits differential treatment of criminals." Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 115 (2000). Some – but by no means all

– of the most important disabilities arise in parents' efforts to maintain relationships with their children. See, *e.g.*, *Bottoms* v. *Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (although "a lesbian mother is not *per se* an unfit parent[,] * * * [c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth * * *; thus, that conduct is another important consideration in determining custody").

We ask the Court to consider the findings of recent historical scholarship on the history of sexual regulation, sodomy prohibitions, and anti-gay discrimination as it considers this case. In our judgment as historians, the lessons of this history are clear. The history of antigay discrimination is short, not millennial. In early American history, "sodomy" was indeed condemned, but the concept of "the homosexual" and the notion of singling out "homosexual sodomy" for condemnation were foreign. Through most of our Nation's history, sodomy laws prohibited some forms of same-sex conduct only as one aspect of a more general (and historically variable) prohibition.

It was only in the twentieth century that the government began to classify and discriminate against certain of its citizens on the basis of their homosexual status. An array of discriminatory laws and regulations targeting lesbians and gay men were put in place in a relatively short period of time. In recent years, a decisive majority of Americans have recognized such measures for what they are – discrimination that offends the principles of our Nation – yet a number of them remain in place. The 1973 Texas Homosexual Conduct Law at issue is an example of such discriminatory laws. They hold no legitimate place in our Nation's traditions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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John D'Emilio is Professor of History and director of the Gender & Women's Studies Program at the University of Illinois, Chicago. He is the author or editor of numerous books including SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983); INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (2d ed. 1997) (with Estelle B.

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John Howard teaches American history at Kings College, University of London. He is the author of MEN LIKE THAT: A SOUTHERN QUEER HISTORY (1999). He has edited three books in American gay history and literature, including a collection of historical essays, CARRYIN' ON IN THE LESBIAN AND GAY SOUTH (1997). He was the inaugural director of the Duke University Center for LGBT Life and has served on the Board of Governors of the American Historical Association's Committee on Lesbian and Gay History.

Lynn Hunt is Eugen Weber Professor of Modern European History at the University of California, Los Angeles. She was President of the American Historical Association in 2002-2003. She is the author of important works on the French Revolution,

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Mark D. Jordan is Asa Griggs Candler Professor of Religion at Emory University. Previously, he taught at the University of Notre Dame and at the Pontifical Institute of Medieval Studies in Toronto. He was awarded a Guggenheim Fellowship in 1996 for work on the rhetoric of Christian moral theology. His recent books include THE INVENTION OF SODOMY IN CHRISTIAN THEOLOGY (1997); THE SILENCE OF SODOM: HOMOSEXUALITY IN MODERN CATHOLICISM (2000); and THE ETHICS OF SEX (2002).

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